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In The

Supreme Court of the United States

October Term, 1975

No. 75-25

FEDERAL TRADE COMMISSION,

Respondent,

vs.

SAUL JAKEL,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SAUL JAKEL
Petitioner Pro Se
32 Suffolk Avenue
Maplewood, New Jersey 07040
(201) 763-2127

(8468) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

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In The

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October Term, 1975

No.

FEDERAL TRADE COMMISSION,

Respondent,

v.

BEAUTY-STYLE MODERNIZERS, INC., a corporation and MORRIS JAKEL and SAUL JAKEL, individually and as officers of said corporation,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The initial decision of the Law Judge of the Federal Trade Commission dated August 31, 1973 appear in the appendix (at p.26a);* the final order of the Federal Trade Commission dated June 11, 1974 and appears in the appendix (55a), the judgment of the Court of Appeals for the Third Circuit was rendered on April 8, 1975 and was amended on April 22, 1975, appears in the appendix at 70a, 72a.

* Reference numbers suffixed by the letter "a" refer to Joint Appendix, filed simultaneously herewith.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered April 8, 1975 and amended April 22, 1975. The jurisdiction of this Court is invoked by 28 U.S.C., Sec. 1254(1).

INTRODUCTORY PARAGRAPH

The petition of Saul Jakel, Morris Jakel, and Beauty-Style Modernizers, Inc., a New Jersey Corporation requests a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Third Circuit, entered in this proceeding on April 8, 1975.

QUESTIONS PRESENTED

1. Is not the decision against the weight of the evidence?

2. Is not the final order harsh and excessive punishment?

STATEMENT OF THE CASE

Petitioner was charged with a violation of Regulation Z of the Truth in Lending Act 15 U.S.C. §1601,et seq.; in failing to disclose certain consumer credit information in connection with their advertising and home improvement contracts from July, 1969, through January 1970 and subsequent thereto.

Complaint was issued September 18, 1972. An Administrative hearing before the Law Judge was held in June, 1974 whose initial decision was rendered August 31, 1973 (26a). From this decision petitioners appealed to the Federal Trade Commission and a hearing was held in January, 1974 on which an order was entered June 11, 1974 by the Federal Trade Commission (55a). Petitioners appealed to the United States Court of Appeals for the Third Circuit, which on April 8, 1975 entered a judgment, as amended, on April 22, 1975, affirming the final order of the Federal Trade Commission (70a, 72a). From this judgment of the United States Court of Appeals for the Third Circuit, petitioners now petition the United States Supreme Court.

The case before the United States Court of Appeals, Third Circuit involved two broad questions:

> 1. Did the petitioners violate the Truth in Lending Act, (15 U.S.C. Sec. 1601, et seq.) and the Federal Trade Commission Act (15 U.S.C. Sec. 45(a)) in failing to disclose certain consumer credit information.
>
> 2. Whether the order of the Federal Trade Commission was too broad and not regulatory but punitive.

Petitioners, Beauty Style Modernizers, Inc., Morris Jakel and Saul Jakel, as individuals operated a home improvement

company at 432 Central Avenue, Newark, New Jersey. The individual petitioners are President and General Manager of the corporation. As part of their business, petitioners made credit transactions. On February 2, 1970, an agent of the Federal Trade Commission came to their place of business as a result of an advertisement on behalf of the petitioners in the Sunday News of December, 1969. At that time, the agent was informed that the ad had been corrected and upon reviewing the ad, the agent agreed that it was correct in its new form, and no violation existed (24a) (p.386a, line 5).

At the same time, while the agent was present, she took a copy of the contract being utilized by petitioners in their business, for review by her agency, and advised petitioners they would have to sign an affidavit assuring discontinuance of the objectionable advertising; although it is clear at that time the objectional advertising no longer existed (24a).

Thereafter, no further advertising appeared in the Daily News, but in the Sunday Star Ledger, a local New Jersey Newspaper, defective ad appeared on June 21, 1970 and July 5, 1970. The ad in the Sunday Star Ledger was not the same as the ad in the News, as set forth before, but was not in compliance. The facts show that the Sunday Star Ledger ad was prepared and placed by P & G Advertising Agency on behalf of the petitioners and went into the newspapers without petitioners knowledge.

Between February, 1970 and June, 1970, petitioners had advertised in the newspaper with the correct ad (23a).

As to the contracts, the agent for the Federal Trade Commission thereafter informed petitioners that the contracts were not in compliance with Regulation Z. A meeting was held before the institution of any complaint of the Federal Trade Commission at which time the Federal Trade Commission representatives requested petitioners to sign an affidavit to cease and desist from utilizing these contracts, which in fact, at that time, the violation had ceased both as to advertising and as to the contracts (Testimony partially stricken). Thereafter a complaint was issued on September 18, 1972 (16a-17a) (23a).

During the proceedings, a stipulation was entered into between the Federal Trade Commission and petitioners (14a-15a).

At the hearing before the Law Judge of the Federal Trade-Commission the Law Judge first sustained the objection by petitioners to the entry of evidence prior to July 1, 1969, in accordance with the stipulation set forth in the appendix but thereafter, reversed himself (17a-20a).

The initial order of the Law Judge was adopted after a hearing before the Federal Trade Commission; although it is undisputed that at the time of the issuance of the order petitioners were no longer in violation and had been in compliance (66a) (23a).

However, the Federal Trade Commission adopted the initial order of the hearing officer.

This order is now presented to this Court for review.

It is only through a hearing in this Court that petitioners can obtain redress to avoid the punitive order which is in effect and not reasonably related to the violation alleged in the complaint and remains a lifetime sentence on petitioner in all of their future business activities.

This order makes the requirement that petitioner secure a signed receipt from persons engaged in the consummation of any extension of consumer credit or any aspect of preparation, creation or placing of advertising, from any future personnel. What right does petitioner have to insist upon such a signed statement; this is unenforcible.

Does the order intend to bind the future personnel of petitioner no matter *whomsoever* they may be. Petitioner envisions the following problem:

> (a) A freelance salesman brings in a customer for the purchase of home improvements having already sold the "job." Does he get a copy of the cease and desist order.
>
> (b) A telephone solicitor making inquiries as to sales which eventually culminate in a consumer credit transaction is involved, even though not employed directly by petitioner.
>
> (c) A banking officer involved in discounting the transaction thereby obviously engaged in extending credit on behalf of petitioner for whom repair job, but employed by others; does he get a copy of the order.

> (d) What about the person involved intermediately with the extension of credit, who seeks information from petitioner for direction to a financing agency. etc.

Petitioner is further ordered to notify the Commission of his discontinuance of business, together with a history of his new business or new employment detailed as to duty and responsibility. How is this regulatory? When does it stop? How does it serve the public welfare?

The order in its third paragraph is even worse:

> IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

Is petitioner to be restricted from selling his business or interest in his business. Is petitioner to guess what corporate changes may effect compliance obligations. Even a jail sentence comes to an end. The maintenance of this order will effectively put petitioner out of business and not regulate, as the commission euphemistically states is the purpose of its order.

Not only is the order unenforcible, but it is punitive in that the good name of petitioner in a business which petitioner has been operating without any prior commission problems for many years.

Point I

The decision is against the weight of the evidence for the following reasons:

AS TO THE COMPLAINT

The complaint charges that:

> "By and through the use of the contract set forth in paragraph four respondents have:
>
> 1. Failed to obtain new contract forms or to alter their existing stock of contract forms prior to, during and subsequent to the period beginning July 1, 1969 and ending December 31, 1969, as required by Section 2266(k) of Regulation Z." (3a).

This is incorrect. Petitioners did obtain new contract forms and did alter existing contracts: (21a, 33a, 80a, 94a).

> "Prior to, during and subsequent to the period beginning July 1, 1969 and ending December 31, 1969."

The complaint was in error. Petitioner brings to the attention of the Court, that he never stated that no steps were taken before July 1, 1969, but rather stated:

> "Q. First, as to what we are talking about now, sir, when, if you recall, did you order the

> contracts which bear the inscription January, 1970? A. I honestly don't remember, but knowing the usual length of time that my printer takes I would presume I probably gave him the order approximately three months earlier" (38a).

Petitioner was telling the truth that he didn't honestly remember and was guessing at this time. A lapse of time from the trial of the case in 1973, more than 4 years from the events involved were the cause of this lapse, but petitioner does state he did take steps and now we know that his memory faulted him (75a).

Petitioner further brings to the attention of the Court, due to the lapse of time by the Commission in bringing this action from the initial charges until the hearing date; many of the records concerning this incident were unavailable as petitioner's memory was clouded by the lapse of time.

Below, however, for the Court's information and attention only, is a replica of a check and receipt from the printer indicating that in fact, petitioner did take such steps prior to July 1, 1969 to obtain new contracts (75a, 76a). The purpose of this information for the Court is to indicate that petitioner did not have a propensity in any manner whatsoever to violate the Federal Trade Commission Regulation as the Law Judge seemed to indicate in his initial decision and order. But in fact, petitioner had been harmed by the lapse of time brought on by the Commission's dilatory tatics.

As for the period July 1, 1969, to December 31, 1969, the "transition period," the Federal Trade Commission was

presented with numerous copies of altered existing stock contracts that were used by petitioners during those six months (80a) As for the period subsequent to December 31, 1969, it is difficult to understand how the Federal Trade Commission can make the statement that respondents: "failed to obtain new contract forms," since they have in their possession many of those new forms and indeed the complaints that follow in sections 2, 3, 4 and 5 of this paragraph five are all levelled against those new contracts (94a). Obviously this entire part one of paragraph five is an invalid complaint and contradicted by the evidence. (22a, 32a, 33a).

The complaint further states:

> "2. Failed to use the term 'cash down payment' to disclose and describe the amount of the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z." (3a).

Petitioner used the term "cash herewith" in place of the required term "cash down payment." Thus the complaint boils down to the use of a single word, "herewith" substituted for "down payment." Since the Federal Trade Commission had not presented any witnesses who have complained about this one word as being injurious to them, and since the word obviously does not change the meaning of the terms in any serious way, it is apparently a harmless error. Respondents have long since changed their contract to comply with the regulations required wording (94a).

The complaint further states:

> "3. Failed to use the term 'unpaid balance of cash price' to disclose and describe the difference between the cash price and the cash down payment, trade-in or total down payment, as required by Section 226.8(c)(3) of Regulation Z." (3a).

This is not correct. Petitioners condensed the term "unpaid balance of cash price" into the two-word term "cash balance" which means exactly the same thing, and in no way altered the meaning or terms of the contract (94a).

Since the Federal Trade Commission has not had any consumer complaints, we can assume that this harmless condensation of a five word phrase into a two word phrase in no way denied the customer of the information he had to have.

Petitioners have long since printed new contract forms using the exact language set forth in Regulation Z.

The complaint further states:

> "4. Failed to use their term 'amount financed' to disclose and describe the amount of credit which the customer had the actual use of as required by Section 226.8(c)(7) of Regulation Z." (3a).

Petitioner's contract does indeed contain the term "amount financed," right on line 3, where it belongs, in capital letters (94a).

Here there was no substitution of words, nor condensation of terms used. The term "amount financed" is used exactly as required by Regulation Z. When this error of fact was pointed out to the Federal Trade Commission representative, the response was silence and remains a part of the Federal Trade Commission complaint.

One would hope that the complaint would at least have the virtue of being accurate in so simple a matter as whether or not the contracts contain the phrase "amount financed."

The complaint also stated:

> "5. Failed to use the term 'total of payments' to disclose and describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z." (4a).

In place of their term "total of payments" petitioner substituted the term "time balance," and for a good reason. A glance at the model contract proposed by the Federal Reserve Board will show why (92a).

The term "total of payments" is inaccurate and misleading in that it implies that it includes the total of all payments. This is wrong because it does not include the down payment. Petitioners substitution of the term "time balance" was more accurate, coherent and explicit. Petitioners intentions here were good and the results were apparently good too, because there were no customer complaints. Petitioners spoke to representatives of the Federal Trade Commission and they

agreed that no harm was done by the substituted phrase and the complaint was trivial (79a).

Petitioner has long since printed new contract forms using the exact term specified by Regulation Z.

No items were omitted, only three items, out of seventeen required items, were changed with no significant change in meanings.

It would be well to note now in which ways the contract *was* in accordance with Regulation Z for there were some seventeen items required, not one of which was omitted (93a):

Those items were:

1. The total dollar amount of the finance charge.

2. The date in which the finance charge begins to apply.

3. The annual percentage rate.

4. The number of payments.

5. The amount of payments.

6. The due date of payments.

7. The total of payments.

8. The amount charged for any default or deliquency, etc. or the method used of calculating that amount.

9. How the unearned part of the finance charge is calculated in the case of prepayment.

10. Charges deducted from any rebate or refund.

11. Description of any security to be held.

12. Description of any penalty charge for prepayment of principal.

13. The cash price.

14. The down payment.

15. The amount financed.

16. The finance charge.

17. The deferred payment price.

All of these items are in the contract and fourteen of these items are in the exact wording required by Regulation Z. As for the three items in dispute, two questions arise:

1. Do the changes in wording affect the original meaning intended.

2. Do the changes in wording affect the customers' ability to comparison shop for financing?

Regulation Z says as to the purpose of the regulation (2) this part implements the act, the purpose of which is to

assure that every customer who has need for consumer credit is given meaningful information with which he can compare the cost of that credit, which, in most cases, must be expressed in the dollar amount of the finance charge, and as an annual percentage rate computed on the unpaid balance of the amount financed (Section 226-1).

Again, quoting the Board of Governors of the Federal Reserve System "What You Ought To Know About Regulation Z."

> "ITS PURPOSE — the purpose of Regulation Z is to let borrowers and customers know the cost of your credit so that they can compare your costs with those of other credit sources and avoid uninformed use of credit."

Two important points to bear in mind:

> The *finance charge* and the *annual percentage rate* are really the two most important disclosures required by the regulation. They tell your customer, at a glance, how much he is paying for his credit and its relative cost in percentage terms."

So here we have the heart of the regulation, the *finance charge* and the *annual percentage rate!* The finance charge and the annual percentage rate both of which appear in petitioners' contract are exactly as required by the regulation in bold type. The two really most important disclosures (along with all the

other 15 disclosures) are where they should be, but the Federal Trade Commission makes no note of them.

We call the Court's attention to the fact that this was a brand new law and no one knew how strict enforcement would be on such immaterial matters. It is apparent that petitioners contracts abide in all respects with the spirit, and in almost all respects with the letter of the law.

Petitioners have never opposed the Federal Trade Commission regarding the changes in the contract wording but their issuing of a cease and desist order is grossly excessive punishment for infractions so trivial that not one complaining customer has come forward, not to mention that not one injured party could be found.

The complaint goes on:

> "In the ordinary course of their business as aforesaid, and subsequent to July 1, 1969, respondents caused newspaper advertisements to be published. These advertisements aided, promoted or assisted directly or indirectly in extensions of consumer credit in connection with sale of respondents goods and services. By and through the use of the advertisements, respondents: (4a)
>
> stated that 'first payment in six months . . . ' and 'no down payment — three years to pay;' thereby implying and stating that no downpayment was required in connection with consumer credit transactions. . . ."

The complaint indulges in obscurantism by taking quotes from two different ads and lumping them together. Further because the complaint does not specify the dates that the ads appeared. Furthermore, the quote "first payment in six months" in no way violates Regulation Z. The Federal Trade Commission has not demonstrated that any particular sale and extension of credit resulted directly or indirectly from the particular advertisement that the Federal Trade Commission found in violation. Most of petitioners business is in cash sales, not credit sales. Since petitioners have other sources of customer contact such as recommendations by satisfied customers, telephone solicitation, etc., the Federal Trade Commission complaint here is entirely without any substantiation that any consumer credit contracts resulted from the offending ad. The complaint states "the advertisements . . . stated that 'first payment in six months . . . no down payment — three years to pay' thereby implying and stating that no down payment was required. . . ."

The complaint here seems to imply that the above listed offers were not factual. No down payment — three years to pay, first payment in six-months were and still are terms that are available to customers, in accordance with the law.

Regulation Z states:

"Section 226.10 Advertising Credit Terms:

(a) General rule. No advertisement to aid, promote, or assist directly or indirectly any extension of credit may state.

(b) That no down payment or that a specified down payment will be accepted in connection with any extension of credit unless creditor usually and customarily accepts or will accept down payment in that amount. Respondents do usually and customarily and will accept no down payment contracts."

The complaint continues the ad failed to state:

". . . all of the following items in terminology prescribed under Section 226.8 of Regulation Z as required by Section 226.10(d)(2) thereof:

(i) The cash price
(ii) The number, amount and due dates or period of payments scheduled to repay the indebtedness
(iii) The amount of the finance charge expressed as an annual percentage rate
(iv) The deferred payment price." (5a).

The above listed items are almost impossible to include in a contractors' ad because every contract varies in price, amount financed, length of time of the loan, etc. The net result of this legal requirement has been that contractors simply do not include such items as "no money down," etc. . . in their ads even though these features are available to customers.

These weren't particularly important items in the ad, in any event, and petitioners were advertising other products at that time which did not include such features as "no money down," etc. in the ads.

It is worthy of note, however, that the four pertinent items,

(i) The cash price
(ii) The number, amount and due dates . . . of payments
(iii) The annual percentage rate
(iv) The deferred payment price

were all supplied by petitioners in their contracts with customers.

The ads that the Federal Trade Commission found defective were prepared ten (10) years prior to the complaint. They had been running virtually unchanged for those ten years (80a).

As soon as the Federal Trade Commission informed the petitioners of the defects, the ad was corrected (24a). The corrected ad has been running that way for the last five and half years.

The new regulation with the new advertising requirements were not well known in the industry. No one seemed to know the new rules. The Federal Trade Commission had done nothing to publicize those new rules to the general industry. The fact that the offending ad was innocuous is self evident. The Federal Trade Commission, contacting everyone of the petitioners' time sales customers was unable to produce one single complaining or injured buyer.

AS TO THE INITIAL DECISION — FINDINGS OF FACT

The Law Judge quotes Saul Jakel's answer to a question:

A. "I did not print new contracts (38a)."

This was referring to the new contract that had already been printed up for use in 1970. This attempt to portray petitioners as recalcitrant about printing up a second set of new contracts is misleading. On the contrary F.T.C. representative Reiss testified that negotiations regarding the wording of new contracts were going on immediately after petitioners were informed of the contracts' defects (82a-83a).

The Law Judge also stated:

> "13. It does not appear that the respondents took bona fide steps prior to July 1, 1969 to order contract forms which would satisfy the requirements for Regulation Z" (38a).

This is not correct. Petitioners have proof in the form of a cancelled check that they took bona fide steps prior to July 1, 1969 to order contract forms to meet the requirements of Regulation Z. Mr. Jakel repeatedly said that he could not remember when he ordered the new contracts.

> "Q. Were you told by anybody . . . that you were required . . . to make efforts to obtain new printed forms to be used prior to January 1, 1970 during the period from July 1, 1969 through

December 31, 1969? Were you told by anyone? A. Not that I recall (38a).

Q. To the best of your recollection, did you make any effort to obtain new printed forms? A. Yes.

Q. Prior to January 1 of 1970? A. Yes.

Q. Will you describe those efforts? A. I went to my printer and I ordered new contracts.

Q. When did you go to your printer? A. I would say somewhere before January 1st, I don't remember the exact date.

Q. January 1st of what year? A. Of 1970 (80a-81a).

THE LAW JUDGE: Mr. Jakel did you take any such steps before July 1, 1969?

PETITIONER: I don't remember, I, I don't think so. . . (38a).

THE LAW JUDGE: . . . the witness simply answered he didn't remember taking any steps, period (81a-82a).

Q. When, if you recall, did you order the contracts which bear the inscription, January, 1970? A. I honestly don't remember. . . (21a).

> Q. And you say three months before December 31, ap, oximately you did, in any event, order new contracts for the purpose of complying? A. Yes, I, I mean, I say that I believe that is probably when I took the step to order it" (39a).

The witness, petitioner, Saul Jakel, was being questioned about a routine event (ordering of contract forms) that had taken place more than four (4) years earlier. Repeatedly he testified that he didn't remember when he had ordered the contracts.

Now, we have proof that the contracts were indeed ordered prior to July 1, 1969 as required by the Regulation (75a, 76a, 77a).

The Law Judge stated:

> "15. The following is language excerpted from an advertisement placed by the respondents in the New York *Sunday News*, Passaic-Bergen edition on December 7, 1969; 'Easy payments Arranged' . . . 'First payment in 6 months. . .' " (39a).

Neither of the above statements quoted from the ad is in violation of Regulation Z; neither is "Easy Payments Arranged" a part of the complaint.

Regulation Z:

"Section 226.10 Advertising Credit Terms

(d) Advertising of credit other than open end. No advertising to aid, promote, or assist directly or indirectly any credit sale . . . shall state,

(2) The amount of the downpayment required or that no down payment is required; the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit. . . ."

It is evident that this ad in no way violated the rule. Nevertheless, as evidence of petitioners' good faith, once the Federal Trade Commission objects to the phrases "Easy payments arranged" and "First payment in 6 months", they were removed from the ad immediately and have not reappeared in the last five and one-half years. Mrs. Reiss, the Federal Trade Commission representative, confirmed this when she said, "In the new advertising that I had seen, I found nothing objectionable" (24a).

The Law Judge stated:

"18. Advertisements appeared in the Sunday Star Ledger on the dates indicated below and employed the quoted language as indicated:

(a) . . . 'No Down Payment' . . . 'Three years to Pay'. This ad appeared on June 14, 21, and July 5, 1970" (40a).

The format for the ad in the Star Ledger had been prepared ten (10) years prior to the time of the running of the ads in 1970. Advertising in the Star Ledger was done infrequently and when an ad was required the same ten year old ad would be dusted off and run. Petitioners dealt with the Star Ledger through the P & G Advertising Agency.

Mrs. Dorso, an employee of the petitioners, testified that she had informed the agency to delete the terms "no down payment" and "three years to pay" from the Star Ledger ad.

> "Q. Tell the court what you mean. A. No down payment and three years to pay.
>
> Q. Those were the words. . . A. Those were the words that Saul (respondent Saul Jakel) said to have them taken out of the ad.
>
> Q. And you did so? A. That's correct (78a).

Petitioner, Saul Jakel testified that no ad was appearing in the Star Ledger at the time the paper was ordered to make the corrections in December, 1969.

> "Q. What did you do? A. I told Helen to see to it that. . . .
>
> Q. That's Mrs. Dorso? A. Yes . . . that they were deleted from the ad.

Q. And thereafter did you check the Daily News advertisement? A. Yes.

Q. Do you know if they were so deleted? A. Yes.

Q. Did you check the Star Ledger? A. We weren't advertising in the Ledger at that time" (78a-80a).

Since the order to change the Star Ledger ad was given in December, 1969, and the next time the ad was run was in June, 1970, a time lapse of six months, it's easy to see how a mistake could have occurred. The newspaper simply dusted off the same ad that had been used for the last ten years and ran it (23a).

Petitioner testified:

"Q. Now, was the content of each particular ad known to you? A. The content of each particular ad?

Q. That's correct. A. Well, we ran the same ad all the time, the ad did not change from year to year actually. . ." (80a).

Obviously, the Star Ledger ads were run without the necessary corrections due to a mistake by the newspaper's failure to make the requested changes when ordered to do so in December, 1969 (143a).

Petitioners were already involved in a dispute with the Federal Trade Commission stemming from the New York News ad of December, 1969. This dispute was still going on in June, 1970 when the Star Ledger ads were run. It would have been an act of sheer folly for petitioners to deliberately authorize new ads that violated Regulation Z, when they were involved with the Federal Trade Commission over just such a matter.

The ads ran with the objected to phrases due to no fault of the petitioners.

To hold them responsible for someone else's error is precisely the kind of jeopardy that petitioners find so repugnant in the order to cease and desist.

The Law Judge stated:

> "19. The advertisements described in paragraph 18 above which appeared in the Sunday Star Ledger were prepared and placed by P & G Advertising Agency . . . for and in behalf of respondents (Stip. 20).
>
> According to respondents' clerk, Saul Jakel and P & G Advertising Agency prepared the ads jointly" (48a).

The Law Judge makes it sound like a freshly prepared ad, deliberately designed to flaunt the law, at a time when the Federal Trade Commission and the petitioners were already involved in an issue over advertising. It was a 10 year old ad.

The Law Judge stated:

> "Indeed, Saul Jakel admitted that he thought it was not necessary to have new contracts before 1970 . . . . " (85a-86a).

The Regulation specifies a six month transition period prior to January 1, 1970 for using up old contracts.

The Law Judge stated:

> "(Saul Jakel . . . ordered new contracts around September, 1969. He couldn't remember taking any steps before July 1, 1969 nor could he recall any instructions to make such efforts (85a-86a).

Saul Jakel never said that he ordered new contracts around September, 1969. What he said repeatedly, was that he didn't remember when he ordered them (38a).

The Law Judge stated:

> "Section 226.6 of Regulation Z.
>
> (a) Disclosure; General Rule. The disclosures required to be given by this part shall be made clearly, conspicuously, in meaningful sequence . . . and at the time and in the *terminology prescribed.*" (emphasis supplied) (61a).

Petitioners' contract does indeed comply in making disclosures that are " . . . clearly, conspicuously, in meaningful sequence . . . and (for the most part, and for the important items) in the terminology prescribed . . . . "

The Law Judge stated:

> " . . . thereafter *the ad* reappeared inadvertently in format used before the change" (emphasis added) (47a).

This is in error. *"The ad"* never reappeared. The ad in the News was changed in December, 1969 and has remained changed to this day.

The Law Judge stated:

> "The ads which appeared in June and July of 1970, in the Star Ledger used different language stating 'No Down Payment — 3 years to pay.' The format was obviously not that of the old ad" (48a).

This is in error. When he states, "The ads which appeared in June and July of 1970 in the Star Ledger used different language . . . ," he is in error. He is comparing the language of the News ad with that of the Star Ledger. Those ads always used different language.

Saul Jakel testified to the fact that the ads in the News and the Star Ledger had always been different:

> "Q. . . . the advertisement that you use in the Daily News, is this also the same copy that you were using in other newspapers? A. Not identical."(82a).

The Law Judge should have been comparing the language used in the Star Ledger ads of June, 1970 with the previous Star Ledger ads. Then he could not make the mistake of saying, "The format was obviously not that of the old ad."

The ad was indeed the same ad that had been used in the Star Ledger for the past ten (10) years.

The Law Judge stated:

> "Nor can the respondents escape responsibility for the 1970 ads simply because they were placed through their advertising agency . . . . " (48a).

Petitioners do not put the responsibility for the 1970 ads on the advertising agency, but rather upon the newspaper; and they do indeed seek to escape the responsibility for that newspaper's error!

Some six months earlier (at a time when the ad in the Star Ledger was not running) the newspaper, through the P & G Advertising Agency, had been informed that the ad required changing.

The Law Judge was aware of this:

> "My notes indicate that she (Mrs. Dorso) testified that she was told by Mr. Jakel to delete certain things and that she called P & G Advertising Agency and told them" (80a).

Mr. Jakel testified to this (79a).

Here we have unchallenged testimony that the Star Ledger was responsible for not correcting the ad.

The Law Judge stated:

> "That the ads violated Regulation Z is incontrovertible. Section 226.10 (d) of the Regulation provides: No advertisement to aid . . . (any) credit sale . . . shall state . . . (a) the amount of the down payment required or that no down payment is required, the amount of any finance charge, the number of installments or the period of repayment or that there is no charge for credit . . . .
>
> The advertisements itemized in the findings above while speaking of down payments and the period of repayment . . . were therefore, violative of Regulation Z" (48a).

It is an error to say that the December, 1969 ad in the News speaks of " . . . down payments and the period of repayment." It does not. The objected to phrases from this ad are "Easy payments arranged" and "First payment in 6 months."

Neither of these terms refers to either a down payment nor the period of repayment. The regulation refers to two (2) types of payments.

"Down payment" — meaning a deposit or such payment made in advance of the balance to be financed . . . and,

"Installment payment" — meaning the payment that is to be made periodically on the balance to be financed.

The prohibition as to down payments is that the ad may not state " . . . the amount of the downpayment or that no down payment is required."

Obviously the terms used in the News ad, "easy payments arranged" and "first payment in 6 months" in no way indicate the amount of the down payment or that no down payment is required. In fact, they make no reference to the down payment.

Nor can it be argued that "first payment in 6 months" implies that there is no down payment required. There could very well be a down payment with the first (installment) payment beginning six months later. In actual practice it worked both ways, with some contracts having a down payment and some not having a down payment, while in both cases the first (installment) payment began six months later.

The prohibition as to installment payments is that the ad may not state " . . . the amount of any installment payment . . . (or) . . . the number of installments."

Obviously the terms "easy payments arranged" and "first payment in 6 months," in no way indicate "the amount of any installment payment nor the number of installments".

So the News ad has to be omitted from consideration because it did not violate the regulation.

As for the Star Ledger ads of June, 1970, what happened is clear.

In December, 1969 the Federal Trade Commission notified petitioners of alleged defects in their ad then appearing in the News. As it turns out the ad in no way violated the regulation but petitioners immediately changed the ad and it has run that way ever since.

At the same time, December, 1969, petitioners ordered changes to be made in the Star Ledger ad although the ad was not appearing at that time, had not appeared for some time prior to that time, and would not appear for another six months.

One can understand how, after so long a lapse in activity, the newspaper could have made a mistake and neglected to make a change in an ad; a change that had been ordered six months previously.

The Star Ledger's ad format had been prepared some ten (10) years previously and had not been altered in all that time.

When the order finally came to run the ad, the Star Ledger simply dusted off the old ad and ran it without the corrections that had been requested six months earlier.

Consider this, from December, 1969 up to the time of the running of the ad in the Star Ledger in June, 1970 the Federal Trade Commission was trying to bludgeon the petitioners into signing a consent order relative to the News ad; an ad that was not in violation but which had been changed anyhow.

Would two small businessmen, who had cooperated in every way with the Federal Trade Commission, in order to avoid their harassment, now deliberately flaunt the law and prepare a new ad that violated the regulation?

It should be emphasized that as soon as petitioners were told of the deficiencies in the Star Ledger, they changed the ad and have kept it that way for the last five years.

It is clear that the placing of the wrong ad in the Star Ledger was the newspaper's fault.

Indeed, it was precisely the fear of being put in a position of being held responsible for someone elses actions, such as this incident with the Star Ledger, that was a factor in petitioners' decision not to sign the Federal Trade Commission's consent order.

Even if the cease and desist order were justified, and it most emphatically is not, what purpose it would serve at this late date is not clear.

The cease and desist order is a nullity. The petty corrections required in the contracts were made long ago and will remain that way. The ads were changed long ago and will remain that way.

Petitioners have shown by their actions that they can be relied upon to continue the ads and contracts without violations. The infractions were so minor and harmless that reasonable people would be satisfied with that.

The Law Judge ordered:

> "that respondents deliver a copy of this order to Cease and Desist to all present and future personnel . . . . " (53a).

" . . . all present and future personnel . . . . " That's a life sentence, for a non-crime! The embarrasment of interviewing a new prospective employee and then having to present him with a copy of the order is too much. No amount of explaining away would eradicate the feeling of the new co-worker that he was working for criminals. This order is certain to cause good, qualified prospective employees to refuse employment in petitioners' firm upon being handed the cease and desist order This is punishment to a business that it doesn't deserve. Even if petitioners had really committed some serious crime this would be excessive punishment. In this case, its malicious harassment and the Court should not allow it.

The Law Judge further ordered:

> " . . . each individual respondent named herein promptly notify the commission of the discontinuance of his present business of employment and of his affiliation with a new business or employment. Such notice shall

> include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities." (53a).

Even a murderer can eventually finish serving his sentence. The order is a violation of privacy and a denial of freedom in forcing petitioners to report to the Federal Trade Commission every move that petitioners might make for the rest of their lives.

The Law Judge ordered:

> " . . . that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation which may affect compliance obligation arising out of the order." (54a).

The order is a life sentence of being on probation.

The order represents serious and permanent injury to citizens who have not injured anyone.

Point II

The final order was harsh and excessive punishment.

AS TO THE FINAL ORDER

> "The Law Judge found that respondents failed to make the required disclosures (a) in their printed contract forms. . ." (57a).

This is an error. Nowhere did the Law Judge find that petitioners had failed to make the disclosures as required by the meaning of Regulation Z. The complaint regarding the contracts claimed improper terminology only, all disclosures were in the contracts as required and were never an issue.

> "Respondents' major contentions on this appeal are . . . (4) that . . . the advertising agency . . . caused the publication of the advertisements in question;" (58a).

Not true. Petitioners claim that the newspaper was at fault for not changing the ad as instructed.

It was obviously and clearly a mistake on the part of the newspaper media, and did not occur again.

> "With regard to the first of the issues . . . the law judge interpreted this provision as requiring that respondents undertake to *order* new conforming printed contracts prior to July 1, 1969" (60a).

Issue #1 reads as follows:

> "1. Whether respondents failed to obtain new contract forms prior to, during or subsequent to the period beginning July 1, 1969 (effective date of the statute) and terminating December 31, 1969 which were in compliance with the requirements of Regulation Z" (3a).

No word is contained herein relative to "*ordering*" new contracts prior to July 1, 1969. Obviously the matter was irrelevant to this issue above quoted.

> "There is little in the way of a significant dispute on the facts. . ." (61a).

Petitioners are disputing the bulk of the facts in this case.

> "Nor is there any dispute in this record on the point that respondents were repeatedly advised by the Commission's staff that their contract forms failed to make consumer credit disclosures in the precise language required. . ." (62a).

This statement obscures the fact that while petitioners were advised by the Commission's staff that their contracts failed to use certain precise language (in three places -- out of seventeen) at no time did the Commission's staff contend that those contract forms failed to make consumer credit disclosures in a meaningful and complete way as required by the regulation. It further obscures the information that the Commission's staff

advised the petitioners of the contract forms' deficiencies after the fact! To imply that petitioners were recalcitrant about printing a (second) set of new contracts is misleading. Indeed Mrs. Reiss, the Federal Trade Commission's representative testified that she had discussed possible wording changes in the new contracts.

> "A. There was only one area which I agree with him, and after a discussion in the office here, I did come back to him and tell him the way we thought it could be done" (83a).

And again Mrs. Reiss says:

> "A. Well, there were words unpaid balance of the cash — after stating cash price and down payment, there are a whole variety of words — amount financed, unpaid balance of the cash and unpaid balance. Because there were no late charges or other additional charges in this case, all the numbers for unpaid balance of the cash price and unpaid balance and amount financed essentially with the same numbers. He thought it was silly to keep restating all these things because they were the same numbers. I said that they had to be restated but what I would try to do was to come back to New York here and speak to the office and find out whether all these words could not be strung together on one line instead of having to be set out in three separate lines.

Q. And did you discuss that in the office? A. Yes, we did.

Q. And when did you go back to see Mr. Jakel and tell him your decision? A. I didn't go back to tell him my decision.

Q. How did you tell him? A. It was in the letter" (83a).

Here we have evidence that petitioners were in discussion with the Federal Trade Commission representatives relative to printing up new contract forms.

"Q. Now, this note which you admit making says, 'We would appreciate a copy of the new installment contract as soon as it is devised.' Is that what it is? I can't read your writing. A. Yes, devised" (83a).

So here again Mrs. Reiss confirms that petitioners were willing to print new contract forms.

"Q. Tell us about that. A. The reason for my call was to find out what was happening with the affidavits and what was happening with the contracts; and in that conversation he told me they were going to finally — how their contracts comply with the wishes of this office and that a galley was going to go to the printer and that when the galley was ready he would send it to me" (82a).

Here we have Mrs. Reiss confirming petitioners' testimony that new contracts were in the works.

> "The purpose of that statute is to permit the ordinary consumer . . . to receive the kind of credit information that will allow him effectively to compare the credit terms being offered in the market place and thus to 'shop' for the most favorable terms available" (86a).

Petitioners agree. Nowhere is it shown how petitioners' contract fails to do exactly that. It is time that the Federal Trade Commission addressed itself to the fact of the pettiness and harmlessness and of the violations' relative unimportance in the consumers' need to be able to "shop" for better "credit terms in the marketplace."

The three miniscule changes in wording that this case finally comes down to were immaterial. It does nobody any good for the Federal Trade Commission to repeat that the changed terms violated the regulation. Some note should be taken of the fact that they were harmless and not very important.

The fact is that in "shopping" for better credit terms there is only *one* really important thing that the customer has to know and that is the rate of interest. All the rest is secondary. Petitioners' contracts have always supplied that really vital information in bold type as the regulation requires.

While the Federal Trade Commission may very well insist on new contracts containing exact terminology, petitioners' offer

to print those new contracts should have been sufficient to end the matter.

The Federal Trade Commission tried to find customer complaints over the contracts and could find none. The changed wording was motivated by a sincere desire to clarify, not to obscure.

> "According to respondents, the allegedly illegal advertisement in the *News* (CX7) was placed inadvertently" (86a).

Not true. The ad in the News was not placed "inadvertently." Petitioners only point out this unimportant error to show the prevalence of confusion that seems to dominate in the Federal Trade Commission regarding this issue.

> "It is undisputed that the December 7, 1969 advertisement in the *News* . . . failed to make certain credit term disclosures" (65a).

The December 7, 1969 ad in the News did not have to make the "certain credit terms disclosures" that the Commission refers to. The ad makes no reference to down payment or no down payment, or the size or number of payments so it in no way violates the regulation.

> "Nor is it disputed that these violations were brought to the attention of the respondents, both orally and in writing, including personal visitation by Commission staff members" (65a).

A false impression is given here that petitioners were advised and disregarded the advice and repeated the violation. This is wrong. The first ad in the News (December 1969) was not in violation. When the Federal Trade Commission informed petitioners of their objections to the ad, petitioners changed the ad immediately. It has remained changed. The Federal Trade Commission attempted to pressure petitioners into signing an affidavit (consent order) admitting that the ad was in violation. This petitioners refused to do. A long dispute followed. This dispute was still going on in June, 1970 when the Star Ledger had been told to change its ad and failed to do so.

> "Respondent Jakel . . . conceded that he did not check the *Ledger* to determine whether the agency had, in fact, altered the suspect advertising. Nor did respondent's clerk check the *Ledger*" (65a).

It was not for the agency to change the ad. It was for the newspaper to change the ad. The Star Ledger made the mistake. In telling the Star Ledger to change the ad, petitioners and their agency did what they had to do.

Petitioner had no reason to check the Star Ledger since he had no reason to believe the ad would be in violation. Even if petitioner had checked the Ledger and found the violation, it would have been after the fact, and would have made no difference. It made no difference to the Federal Trade Commission that the petitioners immediately thereafter changed the ad.

So, Commissioner Thompson raises a specious point when he says "Respondent Jakel . . . conceded that he did not check the Ledger." Petitioners did change the ad in the Ledger after being told of its irregularities, has that altered the Federal Trade Commission's course of action? Commissioner Thompson's other specious point is in implying that the agency was the one to physically change the ad. The newspaper retains possession of the mat, it was for them to make the change after being told to do so.

Petitioners should like to conclude this section by quoting from Newsweek (July 22, 1974) regarding a case involving Sears, Roebuck & Co., a somewhat larger company than petitioners'; (petitioners employ about eight people).

> "The proposed complaint also drew a rare dissent from one of the FTC's five commissioners. Mayo J. Thompson argued that it contained 'no showing of probable consumer injury' ".

Would that Commissioner Thompson had been as sensitive to that issue in this case?

CONCLUSION

The avid readiness of the Federal Trade Commission to stigmatize small businessmen is shown from the following excerpt from a Federal Trade Commission news release.

> " . . . the agency said that one of its administrative law judges, Harry R. Hinkes had

> found that Beauty-Style Modernizers, Inc., had violated the law by using contract forms that were out of date and did not inform buyers seeking credit of their rights under the law" (N.Y. Times, September 19, 1973).

Petitioners' contracts were not out of date and neither the Federal Trade Commission complaint nor the order ever made the unfounded charge that buyers were not informed of their rights.

At that point in September, 1973, the Federal Trade Commission did more harm to petitioners than ever they deserved for anything they have been accused of by the Federal Trade Commission. The key word, never uttered by the Federal Trade Commission is "injury". Since no one was injured, the Federal Trade Commission won't talk about it. But injury there is — to the petitioners! Permanent, substantial injury.

The complaint was a "catch-all" puffed up for appearances sake. Petitioners have taken each document, the complaint; the initial order; the final order; the appellee's brief, and by supplying the facts, cut the Federal Trade Commission case down to size.

One must presume that the Federal Trade Commission objected to petitioners' wording in the contracts because it was not in the best interests of the customers. Petitioners offered immediately to change their contracts if the Federal Trade Commission would drop its self-serving demand that petitioners sign a consent order relative to the News ad which was not in

violation (petitioners had changed the News ad nevertheless). It is revealing that the Federal Trade Commission chose to continue harrassing the petitioners rather than get the contracts changed to benefit the consumers they are supposed to protect. Or does this reveal that they knew the contracts were harmless? The Federal Trade Commission in attempting to build its case, contacted a large number of customers who had signed these "defective" contracts seeking complaints. They found none; indeed, at no point in these entire proceedings does the Federal Trade Commission make mention of an injured consumer. There weren't any.

The Federal Trade Commission says that uniform phraseology is necessary in the contracts in order that the consumer may "shop" for better credit rates in the market place. But the Federal Trade Commission failed to show that a single one of the petitioners' customers tried to "shop" for better credit rates and was unable to do so because of deficiencies in the petitioners' contracts.

At no point have we seen it demonstrated that customers were denied any information that they had to know.

Not one mitigating factor has been allowed to enter the case. The fact is that the peitioners' wording corresponds exactly with Regulation Z requirements in fourteen out of seventeen terms in the contract, including the two that the regulation considers most important, the annual percentage rate and the finance charge.

Regarding the ads we know that the Federal Trade Commission has no case in either instance. The News was not in violation, and the Star Ledger was the fault of the newspaper.

No note is taken of the fact that the Federal Trade Commission failed to make known to members of the industry its requirements. In view of the fact that this was a new law, some consideration for the fact that errors could have occurred should have been taken.

As to the intent of petitioners' contract, it was to clarify not to obscure. So petitioners' intentions were good.

As to the effect of petitioners' contract, the effect was full disclosure in a clear and logical manner of all the information required by the Truth in Lending Law, so the result of petitioners' actions were good.

The petitioners were in all ways and at all times co-operative and courteous with the various Federal Trade Commission employees involved in this matter and never refused any of their requests (except signing a consent agreement).

We know that nothing done by petitioners has harmed anyone.

We know that the issuance of a cease and desist order against the petitioners does them great harm.

It appears that the Federal Trade Commission must score a certain number of "victories." In so doing, they become oppressors of citizens rather than protectors.

The cease and desist order is a life sentence of being on probation for a non-crime.

We ask that the order to cease and desist be denied or modified.

Respectfully submitted,

s/ Saul Jakel
Petitioner pro se